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## CONDITIONAL CONSENT

(Accepted 17 December 2020)

**ABSTRACT.** There are two distinct ways for someone to place conditions on their morally valid consent. The first is to place conditions on the *moral scope* of their consent—whereby they waive some moral claim rights but not others. The second is to *conditionally token* consent—whereby the condition affects whether they waive any moral claim rights at all. Understanding this distinction helps make progress with debates about so-called “conditional consent” to sexual intercourse in English law, and with understanding how individuals place conditions on their morally valid consent in other contexts.

An English court recently had to decide whether to extradite WikiLeaks founder Julian Assange to Sweden to face rape charges. Discussing Assange’s interactions with a woman known as AA, the court said, “If AA had made it clear that she would only consent to sexual intercourse if Mr Assange used a condom,” then a jury could hold that “there would be no consent if ... he did not use a condom”.<sup>1</sup> Subsequent legal judgments appear to suggest that it is possible for someone to consent to sexual intercourse on the condition that their partner does not ejaculate inside them,<sup>2</sup> or on the condition that their partner is a cisgender man.<sup>3</sup> According to the Crown Prosecution Service, these judgments suggest a “developing concept of conditional consent”. But the CPS notes the “absence of clear authority as to how far the concept extends”.<sup>4</sup> Legal commentators likewise observe that the courts must now address

<sup>1</sup> *Assange v. Swedish Prosecution Authority* [2011] EWHC 2849 (Admin) at [86].

<sup>2</sup> *R (on the application of F) v. DPP and A* [2013] EWHC 945 (Admin).

<sup>3</sup> *R v. McNally* [2013] EWCA Crim 1051.

<sup>4</sup> Crown Prosecution Service, *Rape and Sexual Offences*, Chapter 3: Consent, <<https://www.cps.gov.uk/legal-guidance/rape-and-sexual-offences-chapter-3-consent>> (accessed 13 October 2020).

“whether the concept of conditional consent ought to be extended to other situations”.<sup>5</sup>

The recent judgments cast doubt on previous judgments, in which the courts took the view that the defendant had the complainant’s legally valid consent to sexual intercourse despite breaching the complainant’s condition that he not have HIV,<sup>6</sup> or that the two be married beforehand.<sup>7</sup>

Perhaps the most famous of these older judgments is *Linekar*, in which a prostitute consented to Linekar having sexual intercourse with her on the condition that he pay her £25 afterwards.<sup>8</sup> After having sexual intercourse with the prostitute, however, Linekar absconded without paying her. The court took the view that the prostitute had given legally valid consent to Linekar having sexual intercourse with her.

Should the law of conditional consent be extended to cases like *Linekar*? The existing academic literature leaves the answer to this question unsettled because contributors to that literature differ in their intuitions about cases like *Linekar*. Some commentators have the intuition that there is an important difference between cases like *Assange* and those like *Linekar*.<sup>9</sup> They might be prepared to believe that a defendant who has sexual intercourse with a complainant in breach of a condom-wearing condition lacks the complainant’s valid consent to his having sexual intercourse with her. But they find it hard to believe that the same is true of a defendant who has sexual intercourse with a complainant in breach of a payment condition. Other commentators have different intuitions about cases like *Line-*

<sup>5</sup> Gavin A. Doig and Natalie Wortley, “Conditional Consent? An Emerging Concept in the Law of Rape” *Journal of Criminal Law* 77(4) (2013): pp. 286–291, p. 291.

<sup>6</sup> *R v. Dica (Mohammed)* [2004] EWCA Crim 1103; *R v. Konzani (Feston)* [2005] EWCA Crim 706.

<sup>7</sup> *R v. Papadimitropoulos* (1957) 98 CLR 249 (High Court of Australia).

<sup>8</sup> *R v. Linekar (Gareth)* [1995] QB 250 (Court of Appeal, Criminal Division). The case report leaves the precise details of the condition unclear. One leading criminal law textbook describes it as a case in which “payment was the condition of consent”. Andrew P. Simester et al., *Simester and Sullivan’s Criminal Law* (6th ed., Oxford: Hart, 2016), p. 794. But others describe *Linekar* as a case in which it was not payment, but rather Linekar’s promise of payment, which was the condition of consent. G. Syrota, “Rape: When Does Fraud Vitiolate Consent?” *Western Australia Law Review* 25 (1995): pp. 334–345. See also the discussion in *R v. Jheeta* [2007] EWCA 1699 at [27]. Since the former view is more common, I assume it for simplicity.

<sup>9</sup> See Joel Feinberg, *Harm to Self* (Oxford: Oxford University Press, 1986), p. 300. See also Joan McGregor, *Is it Rape? On Acquaintance Rape and Taking Women’s Sexual Consent Seriously* (London: Routledge, 2005), p. 186; Alan Wertheimer, *Consent to Sexual Relations* (Cambridge: Cambridge University Press, 2003), p. 207. Each of these authors discusses consent induced by deception rather than conditional consent, but I speculate that their position would be similar with respect to both issues. Indeed, as I say in fn13, the existing literature does not always clearly distinguish these two issues.

kar. They believe that there is no relevant difference between someone consenting on the condition that their partner wears a condom, and someone consenting on the condition that their partner pays them afterwards. A defendant who has sexual intercourse with a complainant in breach of either condition lacks the complainant's valid consent to his action.<sup>10</sup> Liberal sexual morality, they say, requires us to respect "individuals' freedom to set their own limits to their consent, be these wide or narrow."<sup>11</sup> On this view, it is illiberal to treat sexual intercourse in breach of some conditions but not others as lacking valid consent. Individuals should, in light of their own conception of the sexual good, be able to place whatever conditions they like on their sexual consent.

In this essay, I advance two theses. The first, and most important, is that there are two distinct ways for A to place conditions on her morally valid consent. One is for A to restrict the *moral scope* of her consent—whereby she waives some moral claim rights but not others. The other is for A to *conditionally token* consent—whereby the condition affects whether A waives any moral claim rights at all.

My second thesis is that understanding the distinction between moral scope restriction and conditional tokening helps make progress with legal debates about so-called "conditional consent" to sexual intercourse in English law. To help make progress with those legal debates, I start by assuming that if B has sexual intercourse with A without A's morally valid consent to B's doing so, then B's action constitutes a moral wrong that ought to be criminalised.<sup>12</sup> More generally, I make what I shall call the *Tracking Assumption*:

*Tracking Assumption*: Whether A gives legally valid consent to B's action ought to track whether A gives morally valid consent to that action.

I argue that, given some plausible assumptions, the defendant acts without the complainant's morally valid consent to his action both in *Assange* and in cases like *Linekar*. Accordingly, I argue that it ought to be the case that he lacks the complainant's legally valid consent to his action. We shall see, however, that it does not follow

<sup>10</sup> Jonathan Herring, "Does Yes Mean Yes? The Criminal Law and Mistaken Consent to Sexual Activity" *Singapore Law Review* 22 (2002): pp. 182–201; Jonathan Herring, "Mistaken Sex" *Criminal Law Review* (2005): pp. 511–524. Herring is concerned primarily with consent induced by mistake, though in "Does Yes Mean Yes?" he often writes in terms of conditions on consent.

<sup>11</sup> Simon Gardner, "Appreciating *Olugboja*" *Legal Studies* 16(3) (1996): pp. 275–297, p. 281.

<sup>12</sup> See Tom Dougherty, "Consent, Communication, and Abandonment" *Law and Philosophy* 38 (2019): pp. 387–405, pp. 387–88.

automatically that the defendant's behaviour should be criminalised using the same offence in each kind of case. Indeed, I suggest that each set of commentators on cases like *Assange* and *Linekar* plausibly gets something right. One set of commentators is correct that in both kinds of case, the defendant acts without the complainant's morally valid consent to his action. But the other set of commentators may be correct that there is an important moral difference between the two kinds of case—a difference in *why* the defendant lacks the complainant's morally valid consent to his action. If that is correct, the difference should, I suggest, be reflected in different offences in the criminal law.

The essay is arranged as follows. In section I, '[Conditional Consent or Deception](#)', I distinguish the issue of conditional consent from the issue of consent induced by deception. In section II, '[A's Giving Morally Valid Consent to B's Action](#)', I outline the familiar picture of how A gives morally valid consent to B's action, and how this picture explains how A places conditions on such consent. On this picture, A places conditions on her morally valid consent to B's action by restricting the *moral scope* of her consent, thereby waiving some moral claim rights but not others. In section III, '[Conditionally Tokening Consent](#)', I introduce the notion of A *conditionally tokening* consent—a distinct and hitherto unnoticed way for A to place conditions on her morally valid consent to B's action. I argue that there are two reasons to believe that it is possible for A to conditionally token consent to B's action. In section IV, '[Legal Implications](#)', I suggest how the law of conditional consent to sexual intercourse should develop in light of the distinction between moral scope restriction and conditional tokening.

#### I. CONDITIONAL CONSENT OR DECEPTION?

Importantly, I am concerned with whether the law of *conditional consent* should be extended to cases like *Linekar*.<sup>13</sup> I am not in this essay concerned with the distinct—though important—issue of deception in these cases. Assange at least arguably deceived AA

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<sup>13</sup> Thanks to the anonymous reviewers for encouraging me to spell out the distinction between conditional consent and deception. The existing academic literature does not always clearly distinguish these two issues. See, e.g., Herring, "Does Yes Mean Yes?"; Hyman Gross, "Rape, Moralism, and Human Rights" *Criminal Law Review* (2007): pp. 220–227, pp. 223–24.

about whether he was wearing a condom when having sexual intercourse with her. And Linekar deceived the prostitute insofar as he never sincerely intended to pay her.<sup>14</sup> Deception is at least sometimes sufficient to prevent a complainant from giving morally valid consent to the defendant having sexual intercourse with her. While clearly important, the issue of deception is distinct from the issue of conditional consent.

To illustrate how the issues of conditional consent and deception can come apart, we can consider a fictional variant of *Assange* called *Condom*.

*Condom.* Amrit tells Bilal, "I consent to your having sexual intercourse with me on the condition that you wear a condom." Without noticing that the condom has come off, Bilal has sexual intercourse with Amrit.

If *Assange* really does involve a concept of conditional consent (rather than merely being a case about consent induced by deception), then that concept applies in *Condom*. Bilal has sexual intercourse with Amrit without her legally valid consent. This is not due to any deception on Bilal's part. Indeed, Bilal's behaviour is not deceptive. Rather, it is because Bilal has sexual intercourse with Amrit in breach of her condition that he wear a condom. I believe that this is the correct analysis of *Condom*. I believe that Bilal lacks Amrit's legally valid consent to his having sexual intercourse with her. I also believe that this is how the law ought to be. This is because Bilal lacks Amrit's morally valid consent to his having sexual intercourse with her, and according to the Tracking Assumption, legally valid consent ought to track morally valid consent.

Importantly, this analysis does not commit us to criminalising Bilal's behaviour. In having sexual intercourse with Amrit without her legally valid consent, Bilal commits the *actus reus* of a sexual offence. Precisely which sexual offence depends on precisely which acts the sexual intercourse involves.<sup>15</sup> To warrant criminalisation, Bilal must have committed the *actus reus* with the relevant culpability or *mens rea*.<sup>16</sup> There is a substantive question about what level of culpability the law should require before holding a defendant criminally liable, i.e., about how to calibrate the *mens rea* require-

<sup>14</sup> Similar things can be said of *R (on the application of F) v. DPP and A and R v. McNally*.

<sup>15</sup> See Sexual Offences Act 2003, ss 1 (rape), 2 (assault by penetration), and 3 (sexual assault).

<sup>16</sup> For helpful discussion of the relationship between *mens rea* and *actus reus* in criminal offences, see Andrew P. Simester et al., *Simester and Sullivan's Criminal Law* 19–20.

ment. One option is to hold a defendant criminally liable only if he acted intentionally. Other options include holding a defendant liable only if he acted recklessly, or perhaps even negligently. If a defendant is truly innocent, then he should not be subject to criminal liability. However we calibrate the *mens rea* requirement, the law should still recognise that Bilal commits the serious moral wrong of having sexual intercourse with Amrit without her morally valid consent, even if he does so non-culpably. The Tracking Assumption enables the law to do just this, by recognising that Bilal commits the *actus reus* of a sexual offence.<sup>17</sup>

## II. A'S GIVING MORALLY VALID CONSENT TO B'S ACTION

Having clarified that I am concerned with conditional consent, I turn in this section to summarising a familiar picture of the role of morally valid consent and its relation to our moral rights. This includes outlining three requirements for A's giving morally valid consent to B's action, and how the familiar picture explains how A places conditions on this consent.

The familiar picture starts with the idea that each of us possesses general moral rights over our person and property. These general moral rights consist in more specific rights against specific interactions by specific individuals. For example, each of us possesses a moral claim right against it being the case that [others-have-sexual-intercourse-with-us], and others owe us the correlative moral duty not to have sexual intercourse with us. Likewise, each of us possesses a claim right against it being the case that [others-enter-our-home], and others owe us the correlative moral duty not to enter. These claim rights create moral defaults: if others have sexual intercourse with us or enter our homes, the moral default is that they infringe our moral claim rights and breach the correlative moral duties. By giving our morally valid consent to others performing these actions, we displace the moral default. We waive the relevant moral claim right and release others from the correlative moral duty.<sup>18</sup>

<sup>17</sup> Thanks to the reviewers for encouraging me to spell out the implications of my view for when we should hold a defendant criminally liable.

<sup>18</sup> This picture of morally valid consent broadly follows that of JJ Thomson in *The Realm of Rights* (Cambridge, MA: Harvard University Press, 1990). Thomson herself builds on Wesley Hohfeld's account of legal rights. For a broadly Thomsonian account of morally valid consent in the sexual domain, see Tom Dougherty, "Sex, Lies, and Consent" *Ethics* 123(4) (2013): pp. 717–744.

For A to give morally valid consent to B's action, three requirements must be satisfied. First, A must *token* consent. Second, A's token must be *morally valid*. Third, B's action must fall within the *moral scope* of A's consent. Let us consider each of these requirements in turn, before turning to the issue of how A places conditions on this consent.

### A. The Tokening Requirement

First, A must *token* consent.<sup>19</sup> For A to token consent is for A to perform an act that constitutes an act of consent. There are differing views about precisely what A must do to token consent. According to the *mental state view*, it is possible for A to token consent purely mentally. For A to token consent, proponents of the mental state view maintain, it is sufficient for A to hold some purely mental attitude or to perform some purely mental act. Proponents of the mental state view disagree about the particular mental attitude or act required of A. For example, according to one suggestion, for A to token consent to B's action, A must *intend* B's action.<sup>20</sup> According to another, A must think to herself that B's action is "okay with me".<sup>21</sup> Proponents of the *speech act view* disagree with proponents of the mental state view. According to the speech act view, for A to perform a token of consent requires not only that A holds a particular mental attitude, but also that A communicates that attitude to B. On this view, tokening consent requires the performance of a speech act

<sup>19</sup> For the language of "tokening" consent, see Franklin G. Miller and Alan Wertheimer, "Preface to a Theory of Consent Transactions" in Franklin G. Miller and Alan Wertheimer (eds) *The Ethics of Consent: Theory and Practice* (Oxford: OUP, 2010) pp. 79–106. Other writers call this "assent", though this is a purely terminological difference. See Kimberly Kessler Ferzan and Peter Westen, "How to Think (Like a Lawyer) About Rape" *Criminal Law and Philosophy* 11 (2017): pp. 759–800.

<sup>20</sup> Heidi Hurd, "The Moral Magic of Consent (I)" *Legal Theory* 2 (1996): pp. 121–146.

<sup>21</sup> Kimberly Kessler Ferzan, "Consent, Culpability, and the Law of Rape" *Ohio State Journal of Criminal Law* 13(2) (2016): pp. 397–439. For other suggestions, see, e.g., Larry Alexander "The Moral Magic of Consent (II)" *Legal Theory* 2 (1996): pp. 165–174; Larry Alexander, "The Ontology of Consent" *Analytic Philosophy* 55 (2014): pp. 102–113.



(though performance of the speech act does not necessarily require “uptake” from B).<sup>22</sup> The relevant speech act will often involve A verbally communicating with B, though it need not. For example, it is possible for a thumbs up to constitute a speech act of consent, if A intends it to communicate an attitude of consent.

In this essay, I shall assume that the speech act view is correct, because the speech act view makes it easiest to illustrate the idea of conditionally tokening consent. However, I believe it may be possible to conditionally token consent on at least some versions of the mental state view—an issue to which I shall briefly return below.<sup>23</sup>

### B. The Validity Requirement

The second requirement is that A’s token of consent must be *morally valid*. For A’s token of consent to be morally valid, I assume that A must be an adult of sound mind whose token of consent is not induced by coercion or deception.<sup>24</sup> I shall assume that this requirement is satisfied in all the fictional cases I discuss.

### C. The Moral Scope Requirement

Third, B’s action must fall within the *moral scope* of A’s consent.<sup>25</sup> To illustrate, consider *Gynaecologist*:

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<sup>22</sup> See, e.g., Tom Dougherty, “Yes Means Yes: Consent as Communication” *Philosophy and Public Affairs* 43(3) (2015): pp. 224–253; Monica R. Cowart, “Understanding Acts of Consent: Using Speech Act Theory to Help Resolve Moral Dilemmas” *Law and Philosophy* 23(5) (2004): pp. 495–525; H.M. Malm, “The Ontological Status of Consent and its Implications for the Law of Rape” *Legal Theory* 2 (1996): pp. 147–164. On the issue of “uptake” from B, see Neil C. Manson, “Permissive Consent: A Robust Reason-Changing Account” *Philosophical Studies* 173 (2016): pp. 3317–3334; Victor Tadros, *Wrongs and Crimes* (Oxford: Oxford University Press, 2016), pp. 205–209; Tom Dougherty, *The Scope of Consent* (Oxford: Oxford University Press, forthcoming) ch. 6.

<sup>23</sup> See fn. 34, below.

<sup>24</sup> On coercion, see, e.g., Japa Pallikkathayil, “The Possibility of Choice: Three Accounts of the Problem with Coercion” *Philosophers’ Imprint* 11(16) (2011): pp 1–20. On deception, see, e.g., Dougherty, “Sex, Lies, and Consent”. Dougherty’s argument concerns the *moral scope* of consent induced by deception. However, it has sometimes been interpreted as an argument about the *validity* of such consent. See, e.g., Campbell Brown, “Sex Crimes and Misdemeanours” *Philosophical Studies* 177 (2020): pp. 1363–1379, p. 1374; Chloë Kennedy, “Criminalising Deceptive Sex: Sex, Identity, and Recognition” *Legal Studies* (2020): pp. 1–20, p. 5 fn. 22. It is partly to avoid such confusions that I address tokening, validity, and moral scope separately in this essay.

<sup>25</sup> For a detailed discussion of the moral scope of consent, see Tom Dougherty, *The Scope of Consent*.

*Gynaecologist*. Patient says to Doctor, “I consent to your inserting a medical instrument into my vagina.” Patient is an adult of sound mind whose token of consent is not induced by coercion or deception. Instead of inserting a medical instrument into patient’s vagina, however, Doctor inserts his penis.<sup>26</sup>

In *Gynaecologist*, Patient does give morally valid consent to Doctor’s doing *something*—namely, inserting a medical instrument into Patient’s vagina. But Doctor does something *else*, outside the moral scope of Patient’s consent. As one nineteenth century judge put it, “the act consented to is not the act done. Consent to a surgical operation or examination is not consent to sexual connection”.<sup>27</sup>

Reflecting on *Gynaecologist* might lead us to assume that the moral scope of A’s consent is given simply by the descriptive content of A’s consent token.<sup>28</sup> After all, in *Gynaecologist*, the moral scope of Patient’s consent includes Patient’s moral claim right against it being the case that [Doctor-inserts-a-medical-instrument-into-Patient’s-vagina], but excludes Patient’s moral claim right against it being the case that [Doctor-inserts-his-penis-into-Patient’s-vagina]. And the descriptive content of Patient’s consent token includes Doctor’s inserting a medical instrument into Patient’s vagina, but excludes Doctor’s inserting his penis into her vagina. These two features of *Gynaecologist* might lead us to assume that the moral scope of A’s consent is given simply by the descriptive content of A’s consent token.

But this is not quite right.<sup>29</sup> To see this, consider *Pen*:

*Pen*. Penelope owns a car and mistakenly believes she also owns a pen. The pen actually belongs to Rex. Pointing to each item in turn, Penelope says to Quintin, “I consent to your borrowing this car and using this pen.”

In *Pen*, the descriptive content of Penelope’s token of consent includes both Quintin’s borrowing the car and Quintin’s using the pen. However, the moral scope of Penelope’s consent—the set of

<sup>26</sup> For a similar legal case, see, e.g., *R v. Flattery* (1877) QBD 410. *Flattery* has at least two complicating features which *Gynaecologist* avoids. First, the complainant in *Flattery* may have been a minor and so incapable of giving *morally valid* consent. Second, *Flattery* *deceived* the complainant about his intentions, which may also have undermined the moral validity of her consent.

<sup>27</sup> *R v. Clarence* (1889) 22 QBD 23, 44.

<sup>28</sup> Since I assume that a consent token is a speech act, I assume that the descriptive content of the token is given by the content of that speech act. However, proponents of the mental state view may hold that the descriptive content of a consent token is fixed by the content of the relevant mental attitude. For example, if for A to token consent to B’s action is for A to *intend* B’s action, then the content of A’s consent token may be fixed by the content of A’s intentions.

<sup>29</sup> See Neil C. Manson, “How Not to Think About the Ethics of Deceiving into Sex” *Ethics* 127 (2017): pp. 415–429, pp. 423–428; “Permissive Consent”, pp. 3319–3320.

moral claim rights she waives by tokening consent—covers only her claim right against it being the case that [Quintin-borrows-the-car]. Penelope lacks a moral claim right against it being the case that [Quintin-uses-the-pen], because Rex rather than Penelope is the pen's true owner. Since Penelope lacks any moral claim rights over the pen, she cannot waive any such rights by consenting. It is true that if Quintin were to use the pen, he would not infringe Penelope's rights. But this is not because Penelope gives morally valid consent to Quintin's using the pen. Rather, it is because Penelope lacks any moral claim rights over the pen in the first place. The lesson from *Pen* is this: It is possible for A to waive a moral claim right against B's action only if A initially possesses a claim right against B's performing that action.<sup>30</sup> Provided A's consent token is morally valid, A's consent token waives a moral claim right against B's action if and only if two requirements are satisfied. First, B's action must be within the descriptive content of A's consent token. Second, A must initially possess a claim right against B's performing that action.

#### *D. The Familiar Picture and Conditions on Morally Valid Consent*

Reflecting on the familiar picture of morally valid consent, we can see that A's morally valid consent to B's action always involves conditions. For example, in *Gynaecologist*, Patient gives morally valid consent to Doctor inserting something into her vagina *on the condition* that it is a medical instrument. On the familiar picture, such conditions restrict the *moral scope* of consent. Patient waives her moral claim right against it being the case that [Doctor-inserts-a-medical-instrument-into-Patient's-vagina], but not her moral claim right against it being the case that [Doctor-inserts-his-penis-into-Patient's-vagina].

### III. CONDITIONALLY TOKENING CONSENT

In this section, I introduce a second way for A to place conditions on her morally valid consent to B's action. The second way is for A to

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<sup>30</sup> This is true at least where A consents on her own behalf. Things may be different, for example, where a parent gives morally valid consent to a surgeon operating on their infant. Since one cannot give morally valid consent to *sexual intercourse* on behalf of another person, I leave this complication aside in this essay.

*conditionally token* consent. Since A's tokening consent is a requirement for A's giving morally valid consent to B's action, A's placing conditions on her consent token is a way for A to place conditions on her morally valid consent to B's action. If the condition on A's tokening is not satisfied, then A does not token consent. And if A does not token consent, then A does not give her morally valid consent to anything at all. In this section, I first illustrate the idea of conditionally tokening consent. I then argue that there are two distinct reasons to believe that it is possible for A to conditionally token consent to B's action—one based on what it takes to token consent, and another based on A's rights.

### A. *Conditionally Tokening Consent: An Illustration*

To illustrate the idea of conditionally tokening consent, consider *Mother*:

*Mother.* On Monday, Aliyah says to Beau, "If you visit your mother on Wednesday, I hereby consent to your entering my apartment on Friday."

In *Mother*, a condition of Aliyah's tokening consent to Beau's entering her apartment on Friday is that he visits his mother on Wednesday. If Beau does not visit his mother on Wednesday, then Aliyah does not token consent. If Aliyah does not token consent, then Aliyah does not give her morally valid consent to Beau's entering her apartment.

Let us now turn to the two reasons to believe it is possible for A to conditionally token consent.

### B. *Speech Acts*

This first reason to believe that it is possible for A to conditionally token consent concerns what it takes to token consent. I have assumed that the speech act view of consent is correct—that a consent token requires a speech act. If this is correct, then we should expect consent tokens to function like other speech acts. More specifically, if consent is a speech act by which we exercise a normative power, we should expect it to function like other speech acts by which we exercise normative powers.<sup>31</sup> Other speech acts by which we exer-

<sup>31</sup> On normative powers, see David Owens, *Shaping the Normative Landscape* (Oxford: OUP, 2012).

cise normative powers include commands and promises. Some work in the philosophy of language suggests that it is possible for A to conditionally token commands and promises. If this is correct, then this gives us reason to believe that it is also possible for A to conditionally token consent.

To see why some philosophers of language believe it is possible to conditionally token a command, consider *Bandages*:

*Bandages.* Doctor says to Nurse, “If the patient is alive in the morning, change the bandages.”

One possible way to think of *Bandages* is as a case in which Doctor tokens command of a conditional. On this picture, Doctor tokens his command unconditionally. But the descriptive content of the token is conditional. However, if the conditional involved is the ordinary material conditional from propositional logic, then this has unhappy implications. On this picture, *Bandages* involves Doctor commanding Nurse to make it the case either that Nurse changes the bandages in the morning, or that the patient is not alive in the morning. On this picture, Nurse could obey the command by killing the patient. To avoid this unhappy conclusion, Dorothy Edgington advances a view of *Bandages* according to which Doctor conditionally performs the speech act of commanding the Nurse to change the bandages—the condition being that the patient is still alive in the morning. If the patient is not alive in the morning, then, on Edgington’s view, Doctor has not performed the speech act of commanding Nurse to change the bandages.<sup>32</sup> If a speech act of command is what it takes to token a command, then if the condition on Doctor’s speech act is not satisfied, then Doctor does not token command Nurse to change the bandages. Since tokening a command is a requirement for giving a morally valid command, it follows that if the patient is not alive in the morning, Doctor does not give Nurse a morally valid command to change the bandages.

Likewise, some philosophers believe it is possible to conditionally token a promise. Margaret Gilbert calls this phenomenon an *externally conditional promise*. As she explains, “The condition of an *externally conditional promise* is a condition for the existence of the

<sup>32</sup> Dorothy Edgington, “On Conditionals” *Mind* 104(44) (1995): pp. 235–329, p. 287. Indeed, Edgington holds the stronger view that “[a]ny kind of speech act can be performed unconditionally or conditionally. There are conditional questions, commands, promises, agreements, offers, etc.” See also, Dorothy Edgington, “Conditionals”, in Lou Goble (ed.), *The Blackwell Guide to Philosophical Logic* (Oxford: Blackwell, 2001) pp. 385–414, p. 410.

[speech act of] promise as such.” Gilbert gives the following example: “On the condition that you do the laundry today, I promise to mow the lawn tomorrow.”<sup>33</sup> This constitutes my speech act of promising to mow the lawn tomorrow, conditional on it being the case that you do the laundry today. If you do not do the laundry today, then I have not performed the speech act of promising to mow the lawn tomorrow. Now, performing the speech act of promising is a requirement for tokening a promise, and tokening a promise is a requirement for my giving you a morally valid promise. Accordingly, if you do not do the laundry today, then I have not given you a morally valid promise to mow the lawn tomorrow.

If it is possible for A to conditionally token commands and promises, then we have reason to believe that it is also possible for A to conditionally token consent.<sup>34</sup>

### C. Rights

There is a second reason to believe that it is possible for A to conditionally token consent. The second reason is especially important for those who deny the Conjunction Thesis:

*Conjunction Thesis.* If A possesses a moral claim right against it being the case that  $[p]$ , then it follows that for any proposition  $q$ , A also possesses a moral claim right against it being the case that  $[\text{both } p \text{ and } q]$ .<sup>35</sup>

<sup>33</sup> Margaret Gilbert, “Is an Agreement an Exchange of Promises?” *Journal of Philosophy* 90(12) (1996): pp. 626–649, p. 633. See also Charles Fried, *Contract as Promise* (Cambridge, MA: Harvard University Press, 1981) pp. 46–47.

<sup>34</sup> I have assumed both that tokening consent requires a speech act, and that Edgington and Gilbert’s analyses of conditional speech acts is correct. Both these assumptions might be challenged. First, Edgington and Gilbert’s analyses of conditional speech acts might be incorrect. (See, respectively, Angelika Kratzer, *Modals and Conditionals* (Oxford: Oxford University Press, 2012) and Luca Ferrero, “Conditional Intentions” *Noûs* 43(4) (2009): pp. 700–741, fn. 30.) If Edgington and Gilbert’s analyses are incorrect, this would show at most that the correct account of conditionally tokening consent is not the one that follows naturally from their analyses. It would not be fatal to the main thesis of this essay, which is that moral scope restriction and conditional tokening are two distinct ways to place conditions on morally valid consent. This becomes even clearer when we consider the possibility that tokening consent does not require a speech act. We can ask: if the mental state view is correct, is it nevertheless possible for A to conditionally token consent to B’s action? The answer depends on precisely which mental attitude or mental action is sufficient for tokening consent. For example, according to one version of the mental state view, for A to token consent to B’s action is for A to *intend* B’s action. (See fn. 20, above.) If this is correct, then it may be possible for A to conditionally token consent to B’s action if A *conditionally* intends B’s action. (On conditional intentions, see Ferrero, “Conditional Intentions”.)

<sup>35</sup> Strictly speaking, these rights are always held against another individual, B. To state this explicitly on every occasion would complicate the discussion without adding to the analysis.

To understand the issue, consider first those who accept the Conjunction Thesis. Those who accept the Conjunction Thesis do not need to invoke conditional tokening for their view to be extensionally adequate, for they can explain any condition in terms of moral scope restriction. On their view, if A wants to give morally valid consent to it being the case that  $p$  if and only if it is the case that  $q$ , then A can waive her moral claim right against it being the case that [both  $p$  and  $q$ ]. To illustrate, consider Aliyah's position in *Mother*. Aliyah wants to give morally valid consent to Beau entering her apartment on Friday if and only if Beau visits his mother on Wednesday. Aliyah possesses a moral claim right against it being the case that [Beau-enters-Aliyah's-apartment-on-Friday]. Those who accept the Conjunction Thesis believe that it follows that Aliyah also possesses a moral claim right against it being the case that [both Beau-enters-Aliyah's-apartment-on-Friday and Beau-visits-his-mother-on-Wednesday]. Consequently, those who accept the Conjunction Thesis have no problem explaining *Mother* as a case of moral scope restriction: Aliyah restricts the descriptive content of her consent token to waive this moral claim right, leaving intact her moral claim right against it being the case that [both Beau-enters-Aliyah's-apartment-on-Friday and Beau-does-not-visit-his-mother-on-Wednesday].

The problem arises for those who deny the Conjunction Thesis. For them, it does not necessarily follow from the fact that Aliyah possesses a moral claim right against it being the case that [Beau-enters-Aliyah's-apartment-on-Friday] that Aliyah also possesses a moral claim right against it being the case that [both Beau-enters-Aliyah's-apartment-on-Friday and Beau-visits-his-mother-on-Wednesday]. As we learned from our discussion of *Pen*, for A to waive a moral claim right, A must initially possess that moral claim right. Consequently, if Aliyah does not possess a moral claim right against it being the case that [both Beau-enters-Aliyah's-apartment-on-Friday and Beau-visits-his-mother-on-Wednesday], then Aliyah cannot waive this right, and so it is not possible to explain *Mother* as a case of moral scope restriction.

Does Aliyah possess a moral claim right against it being the case that [both Beau-enters-Aliyah's-apartment-on-Friday and Beau-visits-his-mother-on-Wednesday]? According to those who deny the Conjunction Thesis, she might not. To see this, consider a view

recently advanced by Hallie Liberto, which implicitly denies the Conjunction Thesis. Liberto considers a case in which Jo and Casey are having sexual intercourse—or, as Liberto puts it, “having sex”. Jo does not want Casey to have sexual intercourse with Jo if Casey is in pain. On Liberto’s view, Jo possesses a moral claim right against [Casey-having-sex-with-Jo], but Jo lacks a moral claim right against [Casey-having-sex-with-Jo-while-Casey-is-in-pain].<sup>36</sup> Putting Liberto’s view in the terminology of this essay, Jo cannot waive a claim right against it being the case that [*both* Casey-has-sexual-intercourse-with-Jo *and* Casey-is-not-in-pain] while leaving intact her claim right against it being the case that [*both* Casey-has-sexual-intercourse-with-Jo *and* Casey-is-in-pain], because Jo does not possess these rights.<sup>37</sup>

There are different possible accounts of why someone might deny the Conjunction Thesis. According to one possible account, which we can call the *Reasonable Demands* account, whether A possesses a moral claim right against it being the case that [*p*] depends on whether it is reasonable for A to demand that *not-p*.<sup>38</sup> On the Reasonable Demands account, whether Jo possesses a moral claim right against it being the case that [*both* Casey-has-sexual-intercourse-with-Jo *and* Casey-is-not-in-pain] depends on whether it is reasonable for Jo to demand that Casey not have sexual intercourse with Jo while Casey is in pain. Let us assume for the sake of argument that it is not reasonable, so that Jo lacks this right. We can now ask whether Jo possesses a moral claim right against it being the case that [Casey-has-sexual-intercourse-with-Jo]. Since it is reasonable for Jo to demand that Casey not have sexual intercourse with Jo, Jo possesses this right. Reasonableness determines whether Jo possesses this right. However, once Jo possesses the relevant right, Jo can choose whether or not to waive it for a range of reasons. For example, Jo can decide not to waive her moral claim right against it being the case that [Casey-has-sexual-intercourse-with-Jo] because Casey is in pain, or because Casey does not share Jo’s taste for pop music. According to the Reasonable Demands account, reasonableness constrains

<sup>36</sup> Hallie Liberto, “Intention and Sexual Consent” *Philosophical Explanations* 20(S2) (2017): pp. S127–S141, pp. S136–S138.

<sup>37</sup> Liberto’s view is formulated in terms of the right that remains intact, whereas I have formulated my examples in terms of the right that is waived.

<sup>38</sup> For an account of rights along these lines, see Jonathan Quong “Rights Against Harm” *Aristotelian Society Supplementary Volume* 89(1) (2015): pp. 249–266.



which rights an individual possesses, but it does not constrain how an individual can *exercise* those rights.<sup>39</sup>

According to another possible account of which rights A possesses—the account that Liberto herself advances—whether A possesses a right depends on the scope of A’s realm of legitimate discretion. Call this the *Legitimate Discretion* account. (If A’s realm of legitimate discretion is equivalent to what A can reasonably demand of others, then the Legitimate Discretion account is equivalent to the Reasonable Demands account.) Now, whether Casey has sexual intercourse with Jo is within Jo’s realm of legitimate discretion. This explains why Jo possesses a right against it being the case that [Casey-has-sexual-intercourse-with-Jo]. By contrast, Liberto maintains, whether Casey is in pain while having sexual intercourse with Jo is something that falls outside of Jo’s realm of legitimate discretion.<sup>40</sup> On Liberto’s view, this explains why Jo lacks a right against it being the case that [*both* Casey-has-sexual-intercourse-with-Jo *and* Casey-is-not-in-pain]. Despite all this, Liberto maintains that if, while having sexual intercourse to which Jo has initially given morally valid consent, Jo comes to know that Casey is in pain, then Jo can revoke her morally valid consent *because* Casey is in pain. Liberto maintains that it is possible for Jo to do this even though whether Casey is in pain while having sexual intercourse is outside Jo’s realm of legitimate discretion. Moreover, Liberto maintains, if Casey tries to initiate sexual intercourse with Jo, Jo can withhold her morally valid consent *because* Casey is in pain. Speaking generally, Liberto says that “A can refuse to waive her... right against B having sex with A in light of finding out about *any* feature of the sexual encounter, even those outside her own realm of discretion.”<sup>41</sup>

I suspect that many people subscribe to the Reasonable Demands account, the Legitimate Discretion account, or some similar account of which rights A possesses—and, as a result—deny the Conjunction Thesis. That said, which if any of these possible accounts is correct is a difficult and contentious issue. Rather than take a stand on which

<sup>39</sup> For a discussion of related issues, see Jeremy Waldron, “A Right to Do Wrong” *Ethics* 92(1) (1981): pp. 21–39.

<sup>40</sup> Liberto, “Intention and Sexual Consent” p. S135. This is easiest to imagine if Casey’s pain is caused by something other than the intercourse itself—for example, by Casey’s pre-existing headache. Whether Casey has sexual intercourse while he has a headache seems like it is in Casey’s realm of legitimate discretion rather than Jo’s.

<sup>41</sup> Liberto, “Intention and Sexual Consent” p. S138.

of these possible accounts is correct, I shall assume for simplicity that those who deny the Conjunction Thesis accept that *Mother* is a case in which Aliyah possesses a right against it being the case that [Beau-enters-Aliyah's-apartment-on-Friday] without Aliyah possessing a right against it being the case that [*both* Beau-enters-Aliyah's-apartment-on-Friday *and* Beau-visits-his-mother-on-Wednesday]. After all, both the accounts just canvassed seem to generate this result. It seems reasonable for Aliyah to demand that Beau not enter her apartment on Friday, but at least arguably unreasonable to demand that he also visits his mother on Wednesday. Likewise, whether Beau enters Aliyah's apartment on Friday seems within Aliyah's realm of legitimate discretion, but whether Beau also visits his mother on Wednesday seems outside this realm. Those who disagree with this verdict about *Mother* should feel free to substitute another case in which A possesses a moral claim right against it being the case that [*p*] but lacks a moral claim right against it being the case that [*both p and q*].<sup>42</sup>

Now, if moral scope restriction is the only way for A to place conditions on her morally valid consent to B's action, then A cannot place a condition on her morally valid consent to B's action unless A initially possesses the relevant right. We have assumed Aliyah lacks a right against it being the case that [*both* Beau-enters-Aliyah's-apartment-on-Friday *and* Beau-visits-his-mother-on-Wednesday]. Accordingly, if moral scope restriction is the only way for Aliyah to place conditions on her morally valid consent, then Aliyah cannot give her morally valid consent to Beau entering her apartment on Friday if and only if he visits his mother on Wednesday. But this is counterintuitive. Intuitively, this is possible. This gives those who deny the Conjunction Thesis reason to believe that there is another way for A to place conditions on her morally valid consent to B's action. A natural suggestion is that it is possible for A to conditionally token consent. On that picture, Aliyah would waive her moral claim right against it being the case that [Beau-enters-Aliyah's-apartment-on-Friday], but would do so conditionally on Beau's visiting his mother on Wednesday.

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<sup>42</sup> If the reader believes that there are *no* such cases, then the reader accepts the Conjunction Thesis.

D. *Can A Make the Truth of Any Proposition a Condition of A's Tokening Consent?*

The idea of conditionally tokening consent raises a question: Is it possible for A to make the truth of *any* proposition a condition on A's tokening consent?<sup>43</sup> For many propositions, making their truth a condition of A's tokening consent seems unproblematic. For example, it seems unproblematic for Aliyah to token consent to Beau's entering her apartment on Friday conditional on the truth of the proposition "Beau visits his mother on Wednesday". But other propositions might raise concerns—consider, "Beau *murders* his mother on Wednesday" or "Beau believes that Aliyah does *not* consent to his entering her apartment on Friday". Here is a problematic example from the sexual domain:

*Climax.* Agnes tokens consent to Barry's having sexual intercourse with Agnes on the condition that Agnes reaches sexual climax before Barry. Barry has sexual intercourse with Agnes. Barry reaches sexual climax before Agnes.

If it is possible for Agnes to make the proposition "Agnes reaches sexual climax before Barry" a condition of her tokening consent to Barry's having sexual intercourse with her, then this seems to yield some concerning results. First, Barry has sexual intercourse with Agnes without her morally valid consent to his doing so. Second, in light of the Tracking Assumption, it ought to be the case that Barry lacks Agnes's legally valid consent to his having sexual intercourse with her. Third, if Barry acts with the relevant *mens rea* (perhaps because he knows he is an unskilled lover), then it follows that it ought to be the case that Barry commits a criminal offence. This will strike many—including myself—as an undesirable overreach of the criminal law.

Given the diversity of possible conditions, answering the general question of whether it is possible for A to make the truth of *any* proposition a condition on A's tokening consent would require at least another essay. However, as we shall see shortly, we can make progress with the legal debates about conditional consent to sexual intercourse without answering this general question here.

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<sup>43</sup> Thanks to an anonymous reviewer for encouraging me to address this question, and for the *Climax* case that follows.

#### IV. LEGAL IMPLICATIONS

Let us now return to the law of conditional consent to sexual intercourse. We began with the question of whether that law ought to be extended to cases like *Linekar*. We then made the Tracking Assumption, which states that whether A gives legally valid consent to B's action ought to track whether A gives morally valid consent to that action. We then saw that there are two distinct ways for one person to place conditions on her morally valid consent to another's action. It follows that there are two distinct ways for a complainant to place conditions on her morally valid consent to a defendant's having sexual intercourse with her. In this section, I use this distinction to argue that the law of conditional consent ought to be extended to cases like *Linekar*, outlining two possible suggestions for how the law might do this. I also briefly suggest that the distinction helps us to understand how individuals place conditions on their morally valid consent in other contexts.

Let us start by considering *Assange*. AA possessed a moral claim right against it being the case that [Assange-had-sexual-intercourse-with-AA]. Plausibly, AA also possessed a moral claim right against it being the case that [*both* Assange-had-sexual-intercourse-with-AA *and* Assange-wore-a-condom]. In more natural language, we can say that AA plausibly had a right against it being the case that [Assange-had-*protected*-sexual-intercourse-with-AA]. If that is correct, then AA plausibly waived this right, leaving in place her moral claim right against it being the case that [Assange-had-*unprotected*-sexual-intercourse-with-AA]. If in these circumstances Assange had unprotected sexual intercourse with AA, then he did something other than that to which she gave her morally valid consent. If Assange did something other than that to which AA gave her morally valid consent, then Assange did not have AA's morally valid consent to what he did. If this is correct, then *Assange* involves moral scope restriction just like *Gynaecologist*, in which Patient gives her morally valid consent to Doctor's inserting a medical instrument into Patient's vagina, but Doctor instead inserts his penis. What Doctor does is outside the moral scope of Patient's consent. Similarly, what Assange did was outside the moral scope of AA's consent.

Now consider *Linekar*. The prostitute possessed a moral claim right against it being the case that [Linekar-had-sexual-intercourse-

with-the-prostitute]. Did she also possess a moral claim right against it being the case that [*both* Linekar-had-sexual-intercourse-with-the-prostitute *and* Linekar-paid-the-prostitute-£25]? In more natural language, we might ask, did the prostitute possess a right against it being the case that [Linekar-had-*paid*-sexual-intercourse-with-the-prostitute]?

Those who accept the Conjunction Thesis must answer yes. According to them, the prostitute's possession of a moral claim right against it being the case that [Linekar-had-*paid*-sexual-intercourse-with-the-prostitute] follows from her possession of the right against it being the case that [Linekar-had-sexual-intercourse-with-the-prostitute]. If that is correct, then we can explain *Linekar* in terms of moral scope restriction. By tokening consent to paid sexual intercourse, the prostitute restricted the moral scope of her consent so as to waive only her right against it being the case that [Linekar-had-*paid*-sexual-intercourse-with-the-prostitute], leaving intact her right against it being the case that [Linekar-had-*unpaid*-sexual-intercourse-with-the-prostitute]. If that is correct, then *Linekar* involves moral scope restriction just like *Assange* and *Gynaecologist*. The prostitute gave her morally valid consent to Linekar having paid sexual intercourse with her, but he instead had unpaid sexual intercourse with her. Since what Linekar did was something other than that to which the prostitute gave her morally valid consent, Linekar did not have the prostitute's morally valid consent to what he did.

Those who reject the Conjunction Thesis might answer no: The prostitute did not possess a right against it being the case that [Linekar-had-*paid*-sexual-intercourse-with-the-prostitute]. What if the prostitute lacked this right? Even if those who reject the Conjunction Thesis believe that the prostitute lacked this right, they should agree that she possessed a right against it being the case that [Linekar-had-sexual-intercourse-with-the-prostitute]. This is where the discussion of conditionally tokening consent comes into play. Earlier, we put off answering the general question of whether it is possible for A to make the truth of *any* proposition a condition of A's tokening consent. Accordingly, if we are to invoke the notion of conditional tokening in *Linekar*, we must now make the following assumption:

*Payment Assumption:* It is possible for A to token consent to B's having sexual intercourse with A conditional on the truth of the proposition "B pays A".

The Payment Assumption is plausible. Indeed, many regard payment as among the most plausible conditions for A to place on A's consent to B's having sexual intercourse with A.<sup>44</sup>

Provided the Payment Assumption is true, we can think of *Linekar* as a case in which the prostitute conditionally tokened consent to Linekar having sexual intercourse with her, with the condition being the truth of the proposition "Linekar paid the prostitute £25 afterwards". On this view, Linekar's paying the prostitute £25 was a condition on her speech act of consent. Since tokening consent requires a speech act, conditionally performing a speech act of consent amounts to conditionally tokening consent. If the condition on the speech act is not satisfied, then the prostitute has not tokened consent. Since her tokening consent is a requirement for her giving morally valid consent to Linekar's having sexual intercourse with her, it follows that she did not give her morally valid consent to Linekar's having sexual intercourse with her. On this picture, Linekar had sexual intercourse with the prostitute without her morally valid consent.

If this picture is correct, then *Linekar* is a case of conditional tokening just like *Mother*. Recall that in *Mother*, Beau's visiting his mother on Wednesday was a condition of Aliyah's speech act of consent to Beau's entering Aliyah's apartment on Friday. Since tokening consent requires a speech act, conditionally performing a speech act of consent amounts to conditionally tokening consent. If the condition on the speech act is not satisfied, then Aliyah does not token consent. Since her tokening consent is a requirement for her giving morally valid consent to Beau's entering her apartment on Friday, it follows that Aliyah does not give her morally valid consent to Beau's entering her apartment on Friday. If Beau enters her apartment on Friday, he does so without Aliyah's morally valid consent to his action.

The preceding discussion might help to explain the different intuitions about *Assange* and *Linekar*. Recall that some commentators have the intuition that there is an important difference between cases like *Assange* and those like *Linekar*. We can now see why philosophical argument might vindicate those intuitions as correct. Whether those intuitions are correct depends on whether the

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<sup>44</sup> See, e.g., Joseph J. Fischel, *Screw Consent* (Oakland, CA: California University Press, 2019) p. 112.

complainants in each kind of case possess the relevant moral claim right. If A possess a right against [B-having-*protected*-sexual-intercourse-with-A] but not against [B-having-*paid*-sexual-intercourse-with-A], then cases like *Assange* are cases of moral scope restriction, whereas cases like *Linekar* are cases of conditionally tokening consent. This is an important difference.

Recall that the commentators in the second set have the intuition that a defendant who has sexual intercourse with a complainant in breach of either condition—whether payment or condom use—does so without the complainant’s valid consent to what he does. My argument in this essay has been that this, too, is correct. Even if there is an important difference between the conditions in the two cases—namely, that one is a restriction on moral scope and the other is a condition on tokening—a defendant who has sexual intercourse with a complainant in breach of either kind of condition does so without her morally valid consent to his action.

Currently, the law treats sexual intercourse in breach of a condition as non-consensual only where what the defendant does falls outside the moral scope of the complainant’s consent. But if I am correct, then a defendant who has sexual intercourse with a complainant in breach of a condition she places on her consent token also has sexual intercourse with the complainant without her morally valid consent to his action. In light of the Tracking Assumption, it ought to be the case that the defendant in such cases lacks the complainant’s legally valid consent to what he does.

Should the law treat sexual intercourse in breach of a condition on tokening in any way differently from sexual intercourse in breach of a restriction on moral scope?<sup>45</sup> I suggest the answer is yes. I have argued that there are three distinct ways in which a defendant might lack a complainant’s morally valid consent to his having sexual intercourse with her. First, the complainant might not *token* consent—for example, where she is unconscious throughout the relevant period. Second, the complainant’s consent might not be *valid*—for example, if it is induced by coercion. Third, the complainant might give morally valid consent to something *other* than his having sexual intercourse with her—for example, his performing surgery on her. I suggest that these different ways in which a

<sup>45</sup> Thanks to an anonymous reviewer for encouraging me to make this explicit.

defendant might lack the complainant's morally valid consent to sexual intercourse should be reflected in the law.

Currently, English criminal law does not make such distinctions. For example, it uses the same offence to criminalise the behaviour of the defendant who has sexual intercourse with an unconscious complainant, the defendant who coerces a complainant into sexual intercourse, and the defendant who engages in sexual intercourse instead of performing medical treatment.<sup>46</sup> However, many theorists have called for more fine-grained individuation of sexual offences, mainly based on considerations of fair labelling.<sup>47</sup> Although the defendant lacks the complainant's morally valid consent to sexual intercourse in each of the cases outlined above, the *reason why* is different in each case. I suggest that the law should acknowledge this difference. The best way for it to do this, I suggest, is through the finer grained individuation of offences, such as sexual-assault-by-lack-of-tokening-of-consent, sexual-assault-by-lack-of-validity-of-consent, and sexual-assault-by-acting-outside-the-scope-of-consent. Indeed, sexual-assault-by-lack-of-tokening-of-consent should plausibly be subdivided further, to reflect the fact that a defendant might lack the complainant's token of consent due either to the complainant's condition not being satisfied (as was arguably the case in *Linekar*) or to the fact that the complainant never even conditionally tokened consent (as where the complainant is unconscious).

How, then, should the law be extended to cover cases like *Linekar*? This depends on whether they are cases of moral scope restriction or conditional tokening. If they are cases of moral scope restriction, then the defendant's behaviour should be criminalised using the offence that should be used to criminalise the defendant's behaviour in *Assange*, namely, sexual-assault-by-acting-outside-the-scope-of-consent.<sup>48</sup> On the other hand, if they are cases of conditional tokening, then they should plausibly be criminalised using a

<sup>46</sup> The offence committed depends on precisely which acts the sexual intercourse involved. See fn. 15, above.

<sup>47</sup> For different suggestions about how to individuate sexual offences, see Matthew Gibson, "Deceptive Sexual Relations: A Theory of Criminal Liability" *Oxford Journal of Legal Studies* 40(1) (2020): pp. 82–109; Tom Dougherty "Affirmative Consent and Due Diligence" *Philosophy and Public Affairs* 46(1) (2018): pp. 90–112, pp. 109–112; Amit Pundik, "Coercion and Deception in Sexual Relations" *Canadian Journal of Law and Jurisprudence* 28(1) (2015): pp. 97–127; Victor Tadros, "Rape without Consent" *Oxford Journal of Legal Studies* 26(3) (2006): pp. 515–543.

<sup>48</sup> We may wish to have a variant on these offences called *rape-by-acting-outside-of-the-scope-of-consent*, etc, depending on precisely which acts the intercourse involves. See fn. 15, above.



different sexual offence, namely, the appropriate subdivision of sexual-assault-by-lack-of-tokening-of-consent.

In applying the distinction between moral scope restriction and conditional tokening, I have in this essay focused on the law of conditional consent to sexual intercourse. But the distinction between moral scope restriction and conditionally tokening consent applies well beyond this. As a result, the distinction might also help us to understand how individuals place conditions on their morally valid consent in other contexts. Since I do not have space to pursue this issue at length here, a full analysis will have to wait for another occasion.

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